THE HON'BLE MR JUSTICE L. NARASIMHA REDDY

Writ Petition Nos.4820, 4823 and 5680 of 2007

Dated 25-04-2007

Between:

T. Anil Kumar and another

…Petitioners

And

Hospital Development Society,
Gandhi Hospital, Secunderabad, and others.

…Respondents

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THE HON'BLE MR JUSTICE L. NARASIMHA REDDY

Writ Petition Nos.4820, 4823 and 5680 of 2007

COMMON JUDGMENT:

In these writ petitions, the award of outsourcing contracts,

for supply of manpower to the Gandhi Hospital, Secunderabad; is challenged.

2) The Hospital Development Society of Gandhi Hospital, Secunderabad, the 1st respondent herein, issued a notification, dated 05-01-2007, inviting tenders for supply of manpower through outsourcing, for different categories of employees. The categories, broadly included, the Staff Nurses, and Class-IV staff. Petitioner in W.P.Nos.4820 of 2007 and 4823 of 2007 (for short '*the 1st petitioner*') filed separate tenders, for supply of Class-IV employees and Staff Nurses. Petitioner in W.P.No.5680 of 2007 (for short '*the 2nd petitioner*') submitted tender for supply of Class-IV staff alone.

3) The ground urged by the petitioners is that though the service charges quoted by them are far less than those, quoted by the respondents 2 to 5, in the writ petitions, the contracts were awarded to the latter, contrary to the terms of the tender notice. Petitioners contend that their tenders were rejected on totally untenable and improper grounds.

4) The 1st respondent filed a detailed counter affidavit, opposing the claims of the petitioners. It is stated that though the tenders submitted by the 1st petitioner found to be otherwise economical, on further verification of the matter, it emerged that the past experience with him, in relation to sanitation contract, is totally unsatisfactory, and in that view of the matter, the contract is not awarded. As regards the 2nd petitioner, it is stated that he did not have the requisite experience, in the concerned field.

5) Learned counsel for the petitioners submit that the very purpose of inviting tenders is, to award the contract to the one, who quotes relatively lesser service charges, and ignoring the charges

quoted by the petitioners, the contract is awarded to respondents 2 to 5, though the charges quoted by them are far higher. It is stated that the petitioners were not blacklisted, and the rejection of their tenders is wholly on extraneous considerations.

6) Learned Government Pleader for Medical and Health submits that, having regard to the nature of service to be rendered by the employees, to be engaged by the hospital, a thorough and close scrutiny was undertaken, about the antecedents of the tenderers, and in the process, the petitioners were found not eligible, to be awarded the contract. She contends that the petitioners do not have any right to insist that the contract must be awarded to them.

7) In the recent past, the Government is taking recourse to the process of outsourcing, instead of appointing employees, through recruitment. The process includes award of the contract to an agency, which possesses the requisite registration and licence, under the relevant provisions of law. The selection of such agencies is by inviting tenders. The tenderers are required to indicate the service charge, in the form of percentage on the amounts paid as salaries to the persons to be engaged; which, in turn are fixed by the respondents.

8) The 1st respondent invited tenders for two categories of employees. For the tender in relation to Class-IV employees, 23 tenders were received, and out of them, 10 were disqualified on technical grounds. Out of the 13, the service charge, quoted by the 2nd petitioner was the lowest, being 0.01%. The 1st petitioner stood next, with 0.09%. Those quoted by the respondents 2 to 5 varied between 0.2% and 2.66%. The 1st respondent has chosen to award the contract to more agencies than one. It is in this context, that it has

considered the cases of respondents 2 to 5, and the 1st petitioner.

9) Though the 2nd petitioner quoted the least amount of service charges, its case was not considered on the ground that it lacked experience. The tender document itself requires the tenderer to mention his experience in the field of supplying the concerned categories of employees. It hardly needs any emphasis, that though the persons are to be engaged, are class IV employees, their experience of working in the hospitals would have its own importance. Apart from that, the agencies must have the experience of handling such employees.

10) After the initial verification of the tenders, the 1st respondent required the tenderers to submit the certificates of their experience. The certificates furnished by the 2nd petitioner related to the following works.

i) "Job work order of Defence Research and Development Organisation, Kanchanbagh, Hyderabad dated
14-05-2003.

ii) Job work order of Defence Metallurgical Research Lab Kanchanbagh, Hyderabad dated 20-01-2003".

11) Since none of them were in relation to any hospitals, the tender of the 2nd petitioner was not accepted, though the service charges quoted by it are the lowest. No exception can be taken to this.

12) Coming to the 1st petitioner, it is no doubt true that his case was considered along with that of respondents 2 to 5, to certain extent, for award of the contract. However, during the course of further verification of the matter, it emerged that the execution of the contract for "*mechanized house keeping services*" awarded to him was, far from

satisfactory. It is stated that the contract was awarded to the 1st petitioner, on 27-01-2006, for a period of one year, and from the very inception, penalties had to be levied, month after month. The contract was ultimately terminated vide proceedings dated 16-06-2006. In view of this background of the 1st petitioner, the 1st respondent had decided not to award the present contract to him, whether in relation to Class-IV employees or Staff Nurses.

13) The past experience of a tenderer would have its own importance and bearing on the award of a new contract. This becomes significant, when the past experience is in relation to the same agency, which invited tenders. While dealing with a Super Speciality Hospital that renders emergency and essential services, the 1st respondent cannot be expected to act mechanically, nor can he be expected to be guided only by the percentage of the service charges. The efficiency and credibility of the agency is certainly relevant. It hardly needs any emphasis that an agency, which invites tenders, cannot be placed under obligation to accept the lowest tender, and had a right to reject any tenders. The only requirement is that the reasons for taking such decision must be tenable and that the action must not be arbitrary. Viewed from this angle, the non-consideration of the cases of the

1st petitioner for award of the contract, for which he submitted tenders, cannot be said to be unreasonable and arbitrary.

14) He is the lowest tenderer for the contract relating to supply of Staff Nurses. The reasons stated above, would hold good for rejection of his case for this tender also.

15) One important aspect, to be noted in this matter is, that though the respondents 2 to 5 have quoted higher service charges; in

the process of negotiations, they agreed to execute the contracts at the charges quoted by the petitioners, which are the lowest. The contracts were accordingly awarded. Therefore, it cannot be said that the proceedings challenged in the writ petition are vitiated or tainted in any manner.

16) During the course of hearing, it was noticed that the reservations provided for under the Andhra Pradesh State and Subordinate Rules are not followed in respect of the employment or engagement of the persons, for the posts covered by the contract. Though that issue does not arise for consideration in these writ petitions, it becomes necessary to take note of certain events, that have taken place in the recent past. The Supreme Court of India stayed the operation of a Central Enactment, which provided for reservation in favour of other backward class candidates, to the extent of 27% for admissions into Central Institutions of Higher Learning, such as IITs and IIMs. Some sections of the society, which demanded reservation of such nature, naturally expressed their unhappiness over this. However, an astonishing development is, that the State of Andhra Pradesh has declared and implemented *Bandh* on 04-04-2007 as a measure of protest, against the orders of the Supreme Court. A rare occasion of unanimity prevailed on this, cutting across political affiliations. Public transport services were withdrawn; public examinations slated for that day were postponed, and the entire administration has come to a standstill.

It was intended to convey a message that the higher judiciary, in general, and the Supreme Court, in particular, is coming in the way of implementation of reservations. Slogans were shouted, crossing limits of decency. Some have gone to the extent of demanding impeachment of the Judges, who passed the said order.

17) The consequences that flow from such a course, and the benefit or loss, that may accrue to the society, on account of the same; would be considered a bit later. The ire expressed by the Government can be understood or justified, if its commitment to provide reservations is unstinted, and if the order of the Supreme Court has come as a stumbling block, for such implementation.

18) There are no IITs or IIMs in the State of Andhra Pradesh. The one, which is proposed, is pushed into controversy, as to location. These institutions of higher learning, till recently, proclaimed that their autonomy is not negotiable. They appear to have shelved it for a while; may be as a ploy of highly sophisticated management skill. The voice of the Government, as to their pattern of admission, is the final word. That however, is a different aspect. The fact remains that except that the new pattern was directed to be deferred, the Supreme Court did not direct the change of the existing pattern.

19) The State Government and others, who supported its cause, can also have a genuine grievance, had the reservations being implemented by it; been directed to be discontinued by any order of Court, keeping aside, the permissibility or otherwise, for the present. The facts of the present case disclose that 200 posts of Attenders and a substantial posts of Nurses in the Gandhi Hospital, which, for the past several decades, were being filled by implementing the rules of reservation, referable to Articles 16(4) and 371-D of the Constitution of India, not to speak of reservation, in favour of women, physically handicapped candidates etc.; are being handled through process of outsourcing. The contract would be awarded to certain individuals or agencies. The minimum pay scales for the post, and some percentage of commission would be paid to the Contractor. The Contractor can engage persons of his choice, and the rules of reservation are left to

winds. It is not as if the procedure adopted in Gandhi Hospital is a solitary instance, or an exception. This pattern is being followed in almost all the departments. Thousands of posts in government departments and organizations are removed from the purview of reservations.

20) The State and Central Governments, which never failed to assert their commitment to reservation in public employment, and determination to enforce reservation in private sectors also; have adopted such policies, with impunity.

21) The purpose of referring to these facts is not to express views on the correctness or otherwise of the policy adopted by the Government. It is for the Government concerned to decide, whether or not to implement reservations, and if so, the extent and manner, thereof. The object is to point out, that, on the one hand the Government had taken away thousands of posts from the purview of reservations, particularly at lower levels, and on the other hand, projected a picture, as though the courts are coming in the way of implementation of reservations. There cannot be a worse distortion of facts than this. Unfortunately several groups and individuals have directed their ire against the courts, ignoring the ground reality. It is futile to think, that the groups or individuals are not aware of these developments. They can be said to have tacitly approved this practice, or turned a blind eye to it.

22) An analysis of these events discloses that a systematic pattern exists and works where, the Government;

a) proclaims a policy, that has social sensitivities and dimensions,

b) pretends implementation of the same; and

c) practices exactly the opposite.

While the first two phenomena appeal to, and evoke emotion, the last one can be discerned only when it is scrutinized dispassionately. It is a matter of common knowledge that emotion clouds reason and wisdom. The best way for one, to ensure that the attention of the public is diverted from an otherwise delicate issue; is to evoke their emotion. Given the intention, one does not find it difficult to find alibies for this purpose. The pity is that all norms and prudence become the casualties, in the process.

23) Irrespective of the form of society or Government, it has a Referee in the shape of Judiciary, to function like an Arbiter. Running of a Government in a republic, and a society governed by rule of law; will be possible only by adhering to the principles of law, whether contained in the Constitution or other statues. It is the prerogative of the Legislature to enact laws; and it is the duty of the executive to implement them. The function of the Judiciary is to adjudicate, whether the laws enacted by the Legislature accord with the Constitution, and whether during the course of implementation of the laws, any deviations are taking place. Broadly, it is comparable to the role of a referee in a game. If a team, which looses a match, starts attacking the referee or umpire, what would be at stake, is not the match, or its result, but the game itself. The rules thereof stand scrapped. It brings about a situation, where a participant would trample the opponent, the referee and the rules of the game, on account of his sheer physical strength. Such events can hardly be called as games.

24) Courts do not and in fact, are not expected to, react to the consequences that flow from their orders or judgments. The above observations are made, with this limitation in mind. The effort is only to drive home the point, that the State which is supposed to ensure

compliance with the orders of the Court, has chosen the opposite way. It is not at all a healthy development and may not have a precedent in any system. If the same pattern is followed by individuals and groups, to express their disagreements with the judgment of the Court in similar fashion, the results will not be difficult to imagine. The State looses its right to prevent others, from becoming law unto themselves. It is for the State to introspect as to how far the acts and omissions pointed above, have added to its credibility.

25) The writ petitions are dismissed. There shall be no order as to costs.

L. NARASIMHA REDDY, J.

Dt.25-04-2007.

Note:
L.R. copy to be marked.

(B/O)
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